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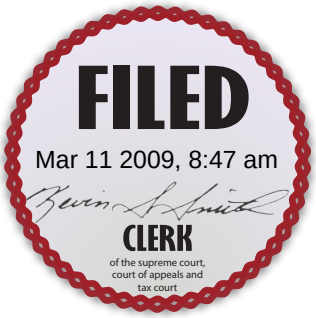

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IN THE
COURT OF APPEALS OF INDIANA

IN RE THE PATERNITY OF G.H.W.,	)	
	)	
H.A.F.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 82A05-0807-JV-431
	)	
Y.K.W.,	)	
	)	
Appellee-Petitioner.	)	

APPEAL FROM THE VANDERBURGH SUPERIOR COURT
The Honorable Reneé Allen Ferguson, Judge
Cause No. 82D01-0301-JP-34

March 11, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARNES, Judge

Case Summary

H.F. ("Mother") appeals the trial court's order modifying custody of her child, G.W. We affirm in part, reverse in part, and remand.

Issues

The issues before us are:

I. whether the trial court properly modified custody of G.W. from primary physical custody with Mother to joint physical custody with G.W.'s father, Y.W. ("Father");

II. whether the trial court properly ordered that Father would be granted custody of G.W. in the event Mother moves to Texas; and

III. whether the trial court erred in eliminating Father's child support obligation.

Facts

G.W. was born out-of-wedlock to Mother in November 2002. In March 2003, Father's paternity of G.W. was established. Pursuant to the agreement of the parties, Mother was granted primary physical and legal custody of G.W. Father was ordered to pay $150 per week in child support. In May 2004, Father was granted joint legal custody of G.W.

In January 2008, Mother filed notice of her intent to relocate to Ft. Worth, Texas. The reason for the move was that in July 2008 she was planning to marry A.J., who lived and worked in Ft. Worth. Father responded to Mother's notice by filing a petition to modify primary custody of G.W. to him.

On June 5, 2008, the trial court held a hearing on these matters. It received evidence that G.W. has extensive family, school, and church connections in the Evansville area, where both Mother and Father live. It also appeared from the evidence that G.W. has a close relationship with Father and his wife, who has known G.W. since she was almost one year old. G.W. also enjoys spending time with her half-sister, the daughter of Father and his wife, who was ten months old at the time of the hearing. There also was evidence that G.W. has had some difficulties adjusting to the fact that Mother is marrying A.J. Father's wife testified that G.W.'s behavior was different when A.J. was in town visiting Mother, such that G.W. resisted going back to Mother after visitation with Father. Regarding these difficulties, Mother told Father, "I'm not gonna be by myself the rest of my life and [G.W.] is just gonna have to deal with it." Tr. p. 225. During the hearing, Mother and A.J. both testified that if G.W. was not permitted to move to Texas, Mother would remain in the Evansville area and A.J. would move and look for work there. For his part, Father clarified that he was seeking modification of physical custody even if Mother did not move.

On July 9, 2008, the trial court entered an order in which it refused to permit Mother to move G.W. to Texas. Specifically, the trial court's order states, "should the mother choose to relocate to the Ft. Worth area . . . primary physical custody shall be placed in the father . . . ." App. p. 31. Additionally, the court ordered "that in the event the mother continues to reside in the Evansville area that it is in the best interest of the child . . . that the father and mother share joint physical and legal custody." Id. The court

also concluded, "in the event the mother does not move to Ft. Worth, Texas, neither party is to pay child support." Id. at 32.

Father filed a motion to correct error, contending that the trial court had impermissibly ordered a prospective change of custody in the event Mother moved to Texas. Father proposed that the trial court avoid this problem by ordering that Father have primary physical custody of G.W., regardless of whether Mother moves, but with Mother receiving extensive visitation amounting to fifty percent of the time if she stays in Evansville, and less time if she moves to Texas. The trial court denied the motion to correct error. Mother has now initiated this appeal, though she does not challenge the trial court's refusal to allow her to move G.W. to Texas at the present time.

Analysis

The trial court here entered findings of fact and conclusions thereon at Father's request. When a party has requested findings and conclusions under Indiana Trial Rule 52(A), we must first determine whether the evidence supports the findings and second, whether the findings support the judgment. Maxwell v. Maxwell, 850 N.E.2d 969, 972 (Ind. Ct. App. 2006), trans. denied. We will disturb a judgment only if there is no evidence supporting the findings or the findings do not support the judgment. Id. We do not reweigh the evidence and will consider only evidence that is favorable to the trial court's judgment. Id. "Appellants must establish that the trial court's findings are clearly erroneous, which occurs only when a review of the record leaves us firmly convinced a

mistake has been made." Id. Although we defer substantially to findings of fact, we do not defer to conclusions of law. Id.

We also note that we may affirm the trial court's judgment on any theory supported by the findings. In re Paternity of A.M.C., 768 N.E.2d 990, 1001 (Ind. Ct. App. 2002). However, because a judgment entered with findings pursuant to a party's request is not a "general judgment," we may not affirm the judgment on the basis of any evidence in the record. Id. "Rather, we must determine whether the findings outlined by the trial court are sufficient to support the judgment." Id.

I. Present Change of Custody

First, we address the trial court's decision to modify custody of G.W. from primary physical custody in Mother to joint physical custody with her and Father equally.[1] In addition to the general standard of review noted above, we review custody modifications for an abuse of discretion, giving special latitude and deference to trial courts in family law matters. Kirk v. Kirk, 770 N.E.2d 304, 307 (Ind. 2002). In an initial custody determination, both parents are presumed equally entitled to custody, but a petitioner seeking subsequent modification bears the burden of demonstrating that the existing custody arrangement should be altered. Webb v. Webb, 868 N.E.2d 589, 592 (Ind. Ct. App. 2007).

In a paternity action, a court may not modify a child custody order unless (1) modification is in the best interests of the child, and (2) there is a substantial change in

[1] We are proceeding on the assumption that Mother in fact has not moved to Texas, as she represented to the trial court she would not do if it did not permit her to move there with G.W.

one or more of the factors that the court may consider under Indiana Code Section 31-14-13-2 with respect to the initial custody determination. In re Paternity of Z.T.H., 839 N.E.2d 246, 252 (Ind. Ct. App. 2005) (citing Ind. Code § 31-14-13-6). The factors listed in Indiana Code Section 31-14-13-2 are:

> (1) The age and sex of the child.
>
> (2) The wishes of the child's parents.
>
> (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
>
> (4) The interaction and interrelationship of the child with:
>
> (A) the child's parents;
>
> (B) the child's siblings; and
>
> (C) any other person who may significantly affect the child's best interest.
>
> (5) The child's adjustment to home, school, and community.
>
> (6) The mental and physical health of all individuals involved.
>
> (7) Evidence of a pattern of domestic or family violence by either parent.
>
> (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 2.5(b) of this chapter.

Here, the trial court found a substantial change of circumstances in the following factors: G.W.'s wishes; G.W.'s interaction with Father; G.W.'s interaction with her half-sister; G.W.'s interaction with family and friends of Father's; and G.W.'s adjustment to Father's home. There is evidence in the record to support these findings; certainly, we cannot say they are clearly erroneous. When the initial custody order was entered, G.W. was only a few months old. At that time, it was impossible to determine how Father and G.W.'s relationship would develop. Since then, the evidence is that Father has been a devoted father to G.W. and that she enjoys spending time with him as she has grown up. Mother admitted at the hearing, in a welcome departure from the rancor we often see in child custody disputes, that Father and G.W. have a positive relationship. G.W. also has developed a substantial and positive relationship with Father's wife, who came into Father's life after the initial custody order was entered. Father and his wife also now have a daughter, G.W.'s half-sister, and the trial court found that it would be beneficial for G.W. to further develop a relationship with her by spending more time in Father's household.

Father asserts in his brief both that "Mother's relationship [with G.W.] has deteriorated" and that "Mother has interfered with the Father's relationship with [G.W.]." Appellee's Br. p. 10. However, the trial court made no findings to this effect on either point and, therefore, we decline to give consideration to Father's assertions. The trial court's change of custody order clearly was not premised upon any wrongdoing by Mother, but upon G.W.'s relationship with her father that evidently has become

increasingly stronger since her infancy, as well as the home and family life that Father can now provide with his wife and G.W.'s half-sister that was lacking at the time of the initial custody order. In other words, it does not appear that the change of custody order was intended to "penalize" Mother (although it may understandably appear that way to her), but to recognize that G.W. would benefit from being able to spend equal time in both Mother's and Father's households.

There also is no evidence of any wrongdoing on A.J.'s part or that he mistreated G.W. in any way. Still, there was some evidence, however slight, that Mother's engagement to A.J. was proving stressful to G.W., as indicated by Father's wife's testimony regarding G.W.'s behavior when A.J. was visiting Mother and Mother's statement that G.W. would have to "deal with" her getting married. Tr. p. 225. Spending more time with Father and his wife, whom G.W. has known since early childhood, may help alleviate that stress and be in G.W.'s best interests. Mindful of the substantial deference we grant to trial courts who are asked to make difficult decisions in family law matters, we cannot say the trial court here abused its discretion in modifying custody of G.W.

II. Prospective Change of Custody

Next, we address Mother's contention that the trial court impermissibly ordered a prospective change of custody to Father if she decides to move to Texas at some time in the future, in violation of Bojrab v. Bojrab, 810 N.E.2d 1008 (Ind. 2004). On appeal, Father contends that there is nothing wrong with the wording of the trial court's order and

that it does not violate Bojrab. Before the trial court, however, Father took precisely the opposite position in his motion to correct error, arguing that re-wording of the order was necessary to avoid conflict with Bojrab. "[P]ursuant to the notion of fairness, a party may not change its theory on appeal and argue an issue that was not properly presented to the trial court." Pardue v. Smith, 875 N.E.2d 285, 289-90 (Ind. Ct. App. 2007).

Regardless, Bojrab did not categorically prohibit custody orders such as the one in this case. The order in Bojrab, which was issued as part of a dissolution decree after the wife had indicated she wanted to move with the children to Michigan, stated in pertinent part:

> [The wife] is granted the custody of the parties' minor children. . . . The best interests of the children are served by requiring that they remain in the Allen County, Indiana community. Accordingly, the grant of custody of the parties' minor children is subject to maintaining their residence in Allen County, Indiana. In the event the [wife] decides to relocate outside Allen County, Indiana, without the agreement of the [husband] or further order of this court, custody of the children shall be granted to the [husband]. . . .

Bojrab, 810 N.E.2d at 1011. Our supreme court held that the language in the order purporting to automatically change custody to the husband should the wife move in the future was improper, but that the language stating that the grant of custody of the children was "subject to maintaining their residence" in Indiana was proper. Id. at 1012-13. Specifically, "While the automatic future custody modification violates the custody modification statute, the conditional determination of present custody does not. The

latter is a determination of present custody under carefully designated conditions." Id. at 1012.

Here, the issue of whether it would be in G.W.'s best interests to move to Texas, and whether such a move would necessitate a change of primary physical custody to Father, was thoroughly litigated. The order stating that Father would be awarded custody if Mother went through with her plans to move to Texas represents the trial court's determination, as of July 9, 2008, the date of the order, that it would not be in G.W.'s best interests to separate her from friends, family, school, and church connections in Evansville. To that extent, the order is a conditional determination of present custody: if Mother moves now, Father is awarded custody of G.W.

However, all indications are that Mother has not moved to Texas at this time. As such, the trial court's order cannot be read as automatically changing custody of G.W. should Mother decide at any time in the future that she wants to move. If Mother makes such a decision, there must be another proceeding like the one we are reviewing here: a notice of intent to relocate by Mother, response by Father, and a hearing by the trial court to determine, at that time, whether G.W. should be permitted to move or if a change of custody is required. Such a future hearing could and must take into consideration any changes in G.W.'s life and Mother's reasons for moving that might have occurred since

July 9, 2008. Subject to this construction, the trial court's order is not improper. See Bojrab, 810 N.E.2d at 1013.[2]

III. Child Support

Finally, we address Mother's argument that the trial court erred in completely eliminating Father's child support obligation with the award of joint physical custody. The court entered no findings explaining why it made this order, aside from noting that child support would be eliminated if Mother did not move to Texas and the parties therefore had joint custody of G.W. This finding was insufficient by itself to support the termination of Father's child support obligation.

The Indiana Child Support Guidelines do not specifically address joint physical custody situations. In fact, the Guidelines "are based on the assumption the child(ren) live in one household with primary physical custody in one parent who undertakes all of the spending on behalf of the child(ren)." Ind. Child Support Guideline 6, cmt. However, this court has held that in joint physical custody situations, it is appropriate to look to the Guideline commentary addressing split custody situations, i.e. where there are multiple children and each parent has custody of one or more of them. See Freese v. Burns, 771 N.E.2d 697, 702 (Ind. Ct. App. 2002), trans. denied; Sanjari v. Sanjari, 755 N.E.2d 1186, 1190 (Ind. Ct. App. 2001). This commentary provides:

[2] Father contends that Indiana Code Section 31-17-2.2-5, which was enacted after Bojrab was decided, would have permitted the trial court to enter a permanent order preventing G.W.'s relocation. It is not clear to us that this is the case. In any event, we will not address the issue further, given Father's not making this argument to the trial court.

> In those situations where each parent has physical custody of one or more children (split custody), it is suggested that support be computed in the following manner:
>
> 1. Compute the support a father would pay to a mother for the children in her custody as if they were the only children of the marriage.
>
> 2. Compute the support a mother would pay to a father for the children as if they were the only children of the marriage.
>
> 3. Subtract the lesser from the greater support amount. The parent who owes the remaining amount pays the difference to the other parent on a weekly basis.

Child Supp. G. 6, cmt. "However, the Guidelines do not foreclose a different support calculation method, for example, ordering each parent to pay one-half the child support he or she would owe as a non-custodial parent, with appropriate credits for extraordinary expenses paid by that parent." Freese, 771 N.E.2d at 702.

What is clear, in any event, is that an award of joint physical custody does not by itself negate the need for one parent to pay child support to the other. Here, Mother still will incur substantial expenses for having custody of G.W. half of the time, including fixed expenses for suitable housing and fluctuating expenses for things such as food. The child support worksheet attached to the trial court's order indicates that, after taking account of Father's after-born child, he has available income of $1357.56 per week versus $572 weekly for Mother. This results in approximately a 70-30 split in income levels, and a basic support obligation (after accounting for daycare costs) of $206.14 for Father and $86.86 for Mother. As it stands now, there is an inadequate basis for not

requiring Father to pay some amount of child support. We reverse the termination of Father's child support obligation and remand for the trial court to calculate an appropriate amount of support in accordance with this opinion and our decisions in Freese and Sanjari.

Conclusion

The trial court did not abuse its discretion in modifying custody of G.W. to joint physical custody between Mother and Father. Additionally, that part of the trial court's order regarding Mother's potential move to Texas should not be construed as absolutely requiring a change of custody should Mother want or need to move at any time in the future. We reverse the trial court's elimination of Father's child support obligation and remand for further proceedings consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

BAILEY, J., and MATHIAS, J., concur.